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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 191

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES AND FARMER BROS. CO. (a corporation), the real party in interest,

Petitioners,

vs.

GAY LILLEFLOREN, RUSSELL MARKS, L. L. SYLVANE, HOMER FORD and IRV MAGISEN,

Respondents.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE CALIFORNIA STATE FEDERATION OF LABOR.

THE FACTS AND THE STATE OF THE RECORD.

This amicus curiae California State Federation of Labor respectfully suggests to this Court:

(1) That no constitutional issue was ever presented to the Supreme Court of California by petitioner, and therefore none can be presented here. Indeed, we urge that petitioner has presented no justiciable constitutional issue whatever in his petition or brief; and

(2) That the Lillefloren case was decided by the Supreme Court of California pursuant to rules of decision laid down by the Courts of California over a period of many years and that this Court in other similar situations has refused to review the rules of the State Court; and

Lastly, we argue that (if this Court should consider the merits of the controversy) the provisions of the so-called Hot Cargo Act are unconstitutional and void under sections 9 and 10 of Article I of the Constitution of California as well as under the First and Fourteenth Amendments to the Federal Constitution.

The brief for petitioner details at great length the allegations of the original complaint, and at the top of page 3 counsel states, as one of the two questions presented to the Court, whether the denial by the Supreme Court of California "of relief under the facts set forth in the complaint" amount to a denial of equal protection of the laws and due process of law.

What counsel fails to disclose to the Court is the fact that on October 15, 1947, Farmer Bros. dismissed their complaint *with prejudice.* Therefore, when the Supreme Court of California decided the *Lillefloren*

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case on February 5, 1948, petitioner Farmer Bros. had no interest whatever to protect under the allegations of their complaint.

I.

NO CONSTITUTIONAL POINT CAN BE RAISED HERE SINCE NO CONSTITUTIONAL ISSUE WAS EVER PRESENTED TO THE COURTS OF THE STATE OF CALIFORNIA.

A careful examination of the record in this case, both in its initial stage before the Superior Court, the trial Court, and before the Supreme Court of California, discloses that the petitioner never presented any constitutional issue to the Courts of California.

In the Points and Authorities presented by petitioner and plaintiff Farmer Bros. to the Superior Court on the request for a temporary restraining order and preliminary injunction it was not claimed that any constitutional right of plaintiff was being infringed.

When we come to the briefs filed by respondent Farmer Bros., we find that respondent's brief in the Supreme Court of California, filed January 6, 1947, contains this topical index of the legal argument:

> "I. The conviction and commitment of the petitioners, and each of them, violates no constitutional right.
>
> "II. The acts committed by the petitioners are acts denounced by the so-called 'Hot Cargo' and

'Secondary Boycott' law of the State of California.

"III. The commitments are valid."

It will be noted that constitutional rights referred to there are the constitutional rights of defendants, including *Lillefloren* who is the subject of the proceeding now before this Honorable Supreme Court.

Similarly, the Reply Brief of respondents (filed in the Supreme Court of California February 17, 1947) contains this topical index of the legal argument:

"Point I. Peaceful picketing.

"Point II. The restraining order was kept in force by appropriate minute orders after the defendants had appeared and asked for continuances.

"Point III. The restraining order as issued by the Superior Court is clear and could be understood by any person of ordinary intelligence; it was not ambiguous.

"Point IV. The court had jurisdiction. The affidavit on which the order to show cause in re contempt was issued, was sufficient,"

and then finally "Conclusion." Throughout this brief there is no mention of any constitutional rights of Farmer Bros, or, of course, of the Superior Court, claimed to be infringed.

Incidentally, in the Response of Farmer Bros. Co., entitled "Objections to Granting Review, Authorities in support of Judgment" (filed in the Supreme Court

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of California October 7, 1946) we find no index of legal argument, since the argument consists entirely of the opinion of a judge of the Superior Court who found *Lillefloren* guilty of contempt, and this document contains no specifications of any constitutional rights of Farmer Bros., alleged to be infringed or abridged.

Up to this point it might be argued that there had been no occasion for the specification of constitutional rights of Farmer Bros. alleged to be infringed since up to that point Farmer Bros. had been on the winning side, and the only constitutional rights shown to have been infringed were the constitutional rights of *Lillefloren* and his companions who had been deprived of their constitutional right of free speech. Now, however, we come to the point where the Supreme Court of California granted the writ of review asked for by *Lillefloren* and his associates, and at this point, if ever, there should appear a claim on behalf of Farmer Bros. that some constitutional right had been abridged; similarly, this was the occasion for the Superior Court to assert infringement or abridgement of any of its constitutional rights. The topical index of this particular argument is as follows:

> "I. The Hot Cargo Secondary Boycott Law is not so vague and indefinite as to warrant its being held invalid;
>
> "II. The Blaney decision should be reconsidered in the light of the Petrillo decision;
>
> "III. The separability clause should save this legislation;

"IV. Under the rules of equity the injunction was good, the acts complained of were all done to coerce the employer to commit an unlafwul act."

The above statement does not claim that Farmer Bros. enjoys or has any constitutional rights in the premises. The Supreme Court of California has held that there is no constitutional right of an employer to conduct his business on a non-union basis, and this is the only right which Farmer Bros. could urge as a constitutional right. (See *Smith Metropolitan Market v. Lyons,* 16 Cal. (2d) 389, at 402, 403 [106 P. (2d) 414-422, column 1]; see also *McKay v. Retail Automobile Salesmen,* 16 Cal. (2d) 311-222 [106 P. (2d) 373, 379, column 2].)

It is essential to jurisdiction of the Supreme Court on appeal that there be an explicit and timely insistence in the State Court that a state statute as applied is repugnant to the Federal Constitution and laws; and a federal question will not be considered when not raised in the State Court or considered there.

Charleston Federal Sav. & Loan Ass'n v. Aldersen, 65 S.Ct. 624, 324 U.S. 182;

Wall v. Chesapeake & Ohio Ry. Co., 256 U.S. 125, 41 S.Ct. 402;

Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S.Ct. 857;

New York v. Graves, 300 U.S. 308, 57 S.Ct. 466;

C. I. O. v. McAdory, 325 U.S. 472, 65 S.Ct. 1395;

State Farm etc. Ins. Co. v. Duel, 324 U.S. 154, 65 S.Ct. 573;

Mabee v. White Plains Pub. Co., 327 U.S. 178, 66 S.Ct. 511;

McCullough v. Kammerer Corporation, 323 U.S. 327, 65 S.Ct. 297, 108 A.L.R. 721.

Before this Court can act, the Court must see plainly that the decision was either directly made of some matter within the purview of the act relating to the court's appellate jurisdiction or that the decision could not have been what it was without necessarily involving such matter.

Honeyman v. Hana, 300 U.S. 14, 57 S.Ct. 350.

While the Supreme Court of the United States has the ultimate power to explore the record for facts in constitutional controversies, it is accustomed to accept the result of the state Court's examination. The findings of the state Courts or the undisputed facts themselves ordinarily furnish the basis for the Supreme Court's appraisal of claimed violations of federal constitutional rights.

Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029.

See, also:

Capital Nat'l Bank v. First Nat'l Bank, 173 U.S. 425, 19 S.Ct. 202;

Green Bay & M. Canal Co. v. Patten Paper Co., 172 U.S. 58, 19 S.Ct. 97.

II.

PETITIONERS HAVE PRESENTED NO JUSTICIABLE CONSTITUTIONAL ISSUE TO THIS COURT.

In the brief in support of the petition for *writ of certiorari* filed herein by the petitioner, there appears at page 11 the following so-called "Specifications of Errors to Be Urged". These specifications are two in number and are as follows:

> "1. In holding that the so-called 'hot cargo and secondary boycott law' was so uncertain that it violated due process of law as protected by the Fourteenth Amendment to the Constitution and that it was unconstitutional for the reason that it abridged the right of free speech as guaranteed by the First Amendment to the Constitution.
>
> "2. In refusing to grant relief to the petitioners in interest under the facts set forth in the complaint, the Supreme Court deprived the petitioners in interest of the equal protection of the law and it amounted to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution."

It will be noted that the only reference in the first specification above to constitutional rights is the reference to the constitutional rights of the members of the Union, including *Lillefloren,* to the right of free speech and freedom of assembly, and the above specification amounts to no more than a complaint that the Supreme Court of California protected these particular rights. No mention is made of any right of Farmer Bros. which was infringed by this protection of the constitutional right of the defendants.

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Now, the second so-called specification of error discloses and betrays the untenable position of petitioners before this Court. Petitioners claim that the Supreme Court of California erred in refusing to grant relief "under the facts set forth in the complaint". This relief sought by Farmer Bros. in their complaint might conceivably be granted after a trial of the issues in the Superior Court, or the relief might be denied by the Superior Court, and should this denial be upheld by the Supreme Court of California on appeal, petitioners would than have had a final judgment by which any constitutional rights of theirs (they mention no such rights) would have been finally abridged, infringed or denied, and there would then be a situation in which they might argue their right to relief before this Supreme Court. However, a trial of the issues has been foreclosed and forever prevented by the dismissal, *with* prejudice, of Farmer Bros.' complaint on October 19 of record herein.

III.

THE UNITED STATES SUPREME COURT WILL NOT REVIEW A STATE COURT DECISION WHICH RESTS UPON NON-FEDERAL GROUNDS EVEN THOUGH A FEDERAL QUESTION IS ALSO INVOLVED.

In the case at bar, the California Supreme Court did not, in our opinion, decide a federal question. The Court said "The temporary restraining order follows closely the language of the Hot Cargo Act (Lab. Code, secs. 1131-1136) which was considered and found in-

valid in *In re Blaney,* 30 Cal. (2d) 643 [184 P. (2d) 892]," and the Court says:

> "The additional contention is made that the defendants and petitioners were engaging in their labor activity for an unlawful purpose, namely, to compel the employer-plaintiff to sign a closed shop contract when it was engaged in inter state commerce, and defendants do not represent a majority of plaintiff's employees; that they were making a demand which would be unlawful under the National Labor Relations Act. (Citations.) But here, the *restraining order* did not forbid the making of such demand or engaging in the labor activity for such purpose."
>
> *Lillefloren v. Superior Court,* 31 Cal. (2d) 439.

There is no discussion of a federal or constitutional question in this opinion. The Court refers to "the temporary restraining order" which "follows the language" of the Hot Cargo Act. The California Supreme Court, in the *Blaney* case, found the *restraining order itself* objectionable in addition to deciding the Hot Cargo Act unconstitutional.

The provisions of the restraining order are set forth in full in the *Blaney* decision and it is apparent that two questions were decided in the *Blaney* case: (1) That the injunction was too vague, indefinite and uncertain; and (2) that the "Hot Cargo Act" was unconstitutional. The Court said, "It [the Hot Cargo Act] and the restraining order issued pursuant to it are too sweeping, vague and uncertain." (30 Cal. (2d) 643 (at 650).) In the case at bar, a reading of

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the decision seems to indicate decision on only one point, the character of the restraining order.

However, if we assume that the decision of the state Court actually covered both points, we then have a situation where the state Court decided two points, one involving a federal question, the other a non-federal point as to the character of the restraining order.

The second was ample authority to sustain the decision of and by itself.

Where two legal questions are considered, one of which involves a federal question and the other does not involve a federal question, with the highest Court of the state sustaining both of them and giving judgment for the defendant, the Supreme Court of the United States will affirm the state judgment without considering the federal question, even though it may have been erroneously decided. This court has often refused jurisdiction where the decision did or could rest on adequate state ground.

Hale v. Akers, 132 U.S. 554, 10 S.Ct. 171 (33 L.Ed. 442);

Flournoy v. Wiener, 321 U.S. 253;

Minn. v. National Tea Co., 309 U.S. 551.

IV.

THE UNITED STATES SUPREME COURT WILL NOT DISTURB THE CONSTRUCTION PLACED ON A STATE STATUTE BY THE HIGHEST COURT OF A STATE.

The assignment of error in the petition for writ of certiorari contains only one count which could be possible cause for reversal by this Court; namely, that the Supreme Court of the State of California wrongly decided that the state "Hot Cargo Act" under which the injunction was issued is "vague, indefinite and uncertain". This Court has said that it confines itself on certiorari to the ground upon which the writ is asked for and granted.

Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 609.

In the petition appellants state their contention in this language: "The Supreme Court of California erred in holding that the so-called 'Hot Cargo Act' was indefinite and uncertain." In effect, they ask this Court to overrule the construction placed upon this statute by the highest Court of the state—to declare the statute to be sufficiently definite and certain to stand constitutional challenge. It must be remembered, first, that this case went up on contempt. The main case was never tried on the merits, and since petitioner has dismissed the case with prejudice, it can never be tried on the merits; and the Supreme Court of California, contrary to appellant's statements in his petition, never passed upon the injunction or the right of appellants to injunctive relief. Nor did the Supreme Court of California deny appellants

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injunctive relief of any kind nor "equal protection of the law" in any manner. *These issues never came before the Court.*

If for no other reason than failure to give adequate information and essential facts in the petition or to state the case as actually presented to the Court below, the writ should be dismissed.

Fox Film Corp. v. Muller, 296 U.S. 207;
Broad River Power Co. v. South Carolina, 281 U.S. 537.

The statements of the decision taken in context show clearly that the Supreme Court of California condemned the restraining order as well as the statute in both the *Blaney* case and the case at bar. The Court said, "a statute so broadly and loosely drawn, which places it within the power of a Court *to grant injunctive relief* which by its terms may be used to strike down the right to freedom of speech, is a prior restraint upon that right and falls squarely within the rule recently declared by this court." (Citing, *In re Bell,* 19 Cal. (2d) 488 [122 P. (2d) 22]. Emphasis ours.)

At another point the Court said, "it [referring to the statute] and the *restraining order issued pursuant to it* is too sweeping, vague and uncertain." Again the Court said, "Language prohibiting conduct that may be prohibited and conduct that may not, affords no reasonable, ascertainable standard of guilt and is therefore too uncertain and vague to be enforced". At another point, "It is a coercive measure and a person does not know in advance whether its application to

his conduct will be constitutional or unconstitutional. He should not be required at his peril to make that determination".

The Court also points out that the vague, indefinite and uncertain character of the restraining order and this statute would lead to the result that "those individuals who *guess* correctly will be released by the Courts, and those who *guess* incorrectly will be punished".

This Court has said that "The office of interpretation is to bring sense out of words used, and not to bring sense into them". (*Smiley v. Kansas,* 196 U.S. 447, 25 S.Ct. 289.) This was found to be an impossible task with respect to this statute and it is our contention that under the decisions of the United States Supreme Court this Court will not attempt to "second guess" the decision of the highest state Court on this point of construction and fact.

The contempt charge was based solely upon the provisions of the vague and indefinite restraining order. The restraining order was in turn based upon the vague and indefinite provisions of the Hot Cargo Act. This shows conclusively that the finding of the California Supreme Court as to the vague and indefinite character of the act was neither arbitrary nor capricious but founded upon ample facts and ably considered by standard legal tests as the decision itself will disclose.

However, back to the point that this Court will not substitute its judgment for that of the highest

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state Court in the matter of construction, we cite the following decisions:

McKay Telegraph Company v. Little Rock, 250 U.S. 74.

This Court refers to the construction of an ordinance of the City of Little Rock, Arkansas, placed upon said ordinance by the Supreme Court of Arkansas in this language:

> "The Supreme Court of the State, as we read its opinion, dealt with the poll fees tax not as an agreed compensation but as a license tax. Consequently, we will—*indeed must, for present purposes,* so regard it." (Emphasis ours.)

To the same effect is,

Hendrickson v. Apperson, 245 U.S. 105.

This Court has held that construction by the state Court of a statute is controlling where the question involved is whether the statute is repugnant to the Federal Constitution—the very question in the case at bar.

Morehead v. New York, 298 U.S. 587, supra;
American Mfg. Co. v. St. Louis, 250 U.S. 459.

This Court also had before it a very similar construction of statute in a New York case. (*Morehead v. New York ex rel Tipaldo,* 298 U.S. 587.) In that case, as in the case at bar, the highest state Court first construed the statute under consideration and then decided that under that construction the Act violated the Fourteenth Amendment. This Court reiterated the principle that the construction of the

Supreme Court of the state was controlling. In that case, as in the case at bar, it was contended that the state court erred in its construction of the statute. (See *Aero Mayflower Co. v. Bd. of R.R. Com'rs*, 68 S.Ct. 167 (Dec. 8, 1947).)

In answering this contention, this Court said:

> "Petitioner's contention that the Court of Appeals *misconstrued the act* cannot be entertained. *This court is without power to put a different construction upon the state enactment from that adopted* by the highest court of the state. We are *not at liberty* to consider petitioner's argument based upon the construction repudiated by that court. The *meaning* of this statute as fixed by its decision must be *accepted* here as if the *meaning* had been specifically expressed in the enactment." (Emphasis ours.)
>
> *Morehead v. N. Y.ex rel. Tipaldo*, 298 U.S. 587, 609.

This Court then went on to consider whether the act *as construed by the state Court* violated the Fourteenth Amendment.

In

Pacific Live Stock Co. v. Oregon Water Board, 241 U.S. 440,

this Court again accepted the construction of a state statute of Oregon as conclusive. In numerous other cases this has been announced in varying forms. As stated previously, it has been applied where the state Court decided the question as to whether a statute conflicted with the Constitution of the United States

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and also to the question as to whether the statute violated state constitutional provisions.

Jefferson Branch Bank v. Skelly, 1 Black U.S. 436.

In *Smiley v. Kansas,* 196 U.S. 447, this Court said:

"It is well settled that in cases of this kind, the interpretation placed by the highest court of the state upon its statutes is controlling here. We *accept the construction given* to a state statute by that court." (Citing *St. L. I. M. & St. P. Ry. Co. v. Paul,* 173 U.S. 404, 408; *M. K. & T. Ry. Co. v. McCann,* 174 U.S. 580, 586; *Tullis v. L. E. & W. Railroad Co.,* 175 U.S. 348.)

This Court went further in this statement:

"Nor is it material that the state court ascertains the *meaning and scope of the statute* as well as its *validity* by pursuing a different rule of construction from what we recognize. It may be that the views of the Kansas Court in respect to this matter are not in harmony with those expressed by us. (Citing cases.) We shall not stop to consider that question * * *"

"The power to determine the meaning of a statute carries with it the power to *prescribe its extent and limitations* as well as *the method by which they shall be* determined." (Emphasis ours.)

The mere fact that this Court might disagree with the decision of the state Court that this statute is "vague, indefinite and uncertain" or would not have made the same decision is not enough to overrule that

decision on a doubtful point (*Milwaukee Electric R. & Light Co. v. Wisconsin*, 252 U.S. 1000) and certiorari will not be granted to review action of a lower Court on which its decision is final.

American Steel Foundries v. Whitehead, 256 U.S. 40;
Baldwin Co. v. R. S. Howard Co., 256 U.S. 35;
U.S. v. Rimer, 220 U.S. 547.

We believe under these decisions that the only review possible, assuming that this Court will review a decision in which the defendants were discharged in a contempt case and in which the highest state Court decided the case on a point not involving the federal question, is whether a statute which has been declared vague, indefinite and uncertain by the California Supreme Court violates the Federal Constitution. We do not find this point clearly raised in the petition for the Writ. However, it seems to us elementary that such a statute cannot stand.

Definiteness in a statute, especially those coercive or criminal in character, is the first necessary element of validity. It has been said that "A statute which either forbids or requires the doing of an act in terms so vague that men of *common intelligence* must necessarily guess at its meaning and *differ as to its application* violates the first essential of due process of law." (*Am. Jur. Constitutional Law*, Para. 585, p. 282.) (Emphasis ours.) Citing

Yu Cong. Eng. v. Trinidad, 271 U.S. 500;
Connelly v. General Cons. Co., 269 U.S. 385;

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Joseph Triner Coys v. McNeil, 363 Ill. 559, 2 N.E. (2d) 929;
Vallat v. Radium Dial Co. (360 Ill. 407), 196 N.E. 485, 104 A.L.R. 1435.

V.

THE DECISION OF THE SUPREME COURT OF CALIFORNIA IN THE LILLEFLOREN CASE, WHICH FURNISHED THE OCCASION FOR THE CERTIORARI PROCEEDINGS AT BAR, INVOLVED QUESTIONS OF CALIFORNIA LAW. THE RULE IN CALIFORNIA REGARDING THE RIGHT OF PEACEFUL BOYCOTT AND PEACEFUL PICKETING HAS DEVELOPED AN INDIVIDUAL AND DISTINCT RULE, AND THE LILLEFLOREN DECISION CONFORMED TO THIS PARTICULAR RULE.

California was one of the first states where the right of boycott and picketing was even discussed as being within the constitutional guarantees. This question arose in California as far back as 1905 in the case of *Jordahl v. Hayda,* 1 Cal. App. 696 [82 P. 1079], where the picketing was conducted under circumstances of great violence and was prohibited on that ground. The District Court of Appeal (on page 699 of the decision), referred to Section 1 of Article I of the Constitution of California as follows:

> "While the right of free speech is guaranteed to all citizens by the constitution, there is also guaranteed to them by the same constitution the right of 'acquiring, possessing and protecting property; and possessing and obtaining safety and happiness' (art. I, sec. 1); and it is a maxim of jurisprudence prescribed by the statute law of

> this state that 'one must so use his rights as not to infringe upon the rights of another'. (Civ. Code, sec. 3514.) These guaranties are equally important to and equally necessary for the protection of all classes of citizens."

And on page 700 the Court said:

> "We do not understand that the trial court decided that carrying a banner, such as was carried in this instance, in the street in front of plaintiff's restaurant, was unlawful or that the judgment necessarily rested on such acts, and no question involving such acts is before us. The judgment enjoins defendants 'from stationing themselves in the doorway of said restaurant or upon the sidewalk in front of the same and there interfering with the business of plaintiff by intimidation, insults, or threats to his patrons, thereby inducing persons not to patronize the restaurant of said plaintiff; and said defendants, * * * are hereby especially enjoined from in any manner interfering with the said business of plaintiff by means of threats or intimidation of any kind or nature, directed against the patrons or customers * * * of said plaintiff and from interfering by means of threats or intimidation with any person that may be working for plaintiff or may desire to work for him in his said restaurant'."

In a long line of cases the higher Courts of California have upheld the right of free speech, free press and freedom of assemblage in cases involving similar situations to that in the case at bar, with specific

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reference to the provisions of the Constitution of California, particularly Sections 9 and 10 of Article I:

In re Lyons, 27 Cal. App. (2d) 293;

People v. Young, 136 Cal. App. 699, 702;

People v. Mintz, 106 Cal. App. 725, 731;

In re Blaney, 30 Cal. (2d) 643;

Chrisman v. Culinary Workers' Local, 49 Cal. App. (2d) 129, 132

(where the California rule as to peaceful picketing was upheld but without specific mention of the California constitutional provisions);

In re Fortenbury, 38 Cal. App. (2d) 284, 291

(the District Court of Appeal, at the page cited, referred to the issues as revolving around Sections 9 and 13 of Article I of the Constitution of California as well as the Fourteenth Amendment. The decision of the District Court of Appeal, refusing to uphold the right of secondary boycott under the facts there existent (which are also the facts in the case at bar, to wit, secondary boycott) was disapproved by the Supreme Court of California in 16 Cal. (2d) 405);

In re Bell, 37 Cal. App. (2d) 582

(peaceful picketing approved, but picketing by violence disapproved);

People v. Taylor, 33 Cal. App. (2d) Supp. 760, 761.

As pointed out above, the right of peaceful boycott and peaceful picketing were upheld and protected by the Supreme Court of California on general grounds down to the decisions in the *McKay* and allied cases in October, 1940. (16 Cal. (2d) 311 [106 P. (2d) 373].)

The decision of the Supreme Court of California in the *Lillefloren* case, handed down February 5, 1948, *and reported at 31 Cal. (2d) 439 [189 P. (2d) 265]*, stated in the second paragraph of the decision as follows:

> "The temporary restraining order follows closely the language of the Hot Cargo Act (Lab. Code, secs. 1131-1136) which was considered and found invalid in *In re Blaney*, 30 A.C. 648 [30 Cal. (2d) 643]."

The so-called "Hot Cargo and Secondary Boycott" Act, secs. 1131 to 1136, inclusive, of the Labor Code was "added by Stats. 1941". (Ch. 623, Sec. 1, p. 2079.) In litigation involving this particular statute it was frequently stated by those seeking to uphold its constitutionality that it was passed pursuant to the language of the Supreme Court of California in the case of *McKay v. Retail Auto. Salesmen*, 16 Cal. (2d) 311 [106 P. (2d) 373], at 331. The majority opinion used this language:

> "The public ultimately pays the full cost of every labor dispute and better labor relations must be established. But if they cannot be brought about by enlightened self-interest the remedy lies with the legislature—not in the courts—in so far as contests peaceably conducted for a purpose legitimately connected with the welfare of labor as a whole is concerned."

The Supreme Court of California in the *McKay* case, just referred to, decided that peaceful picketing by a labor union pursuant to a dispute with an em-

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ployer reasonably relevant to employment relations and the purposes of collective bargaining is a constitutional right. The Court, at the end of the majority opinion, uses the language above cited with reference to the functions of the legislature in the regulation of labor disputes. In many pieces of litigation arising out of the attempted enforcement of the so-called Hot Cargo Act in the Superior Courts of California it was repeatedly asserted and argued that while the Supreme Court of California had upheld the right of peaceful boycott and peaceful picketing as a constitutional right, the Court had invited and suggested recourse to the State Legislature for the regulation and abridgment of this right.

These general statements of Courts to the general effect that a state has a right to regulate the abuse of the right of peaceful picketing and peaceful boycott do not solve the problem before us. The right of a state, either through its legislative, judicial or executive branch, to regulate the conduct of the people does not extend to abridgment of the right of free speech. Section 9 of Article I of the Constitution of California provides that "every citizen may freely speak, write and publish his sentiments on all subjects a citizen being responsible only for the abuse of that right, and no law shall be passed to abridge the liberty of speech or of the press".

And Section 10 of Article I of the Constitution of California is as follows:

> "The people shall have the right to freely assemble together to consult for the common good,

to instruct their representatives, and to petition the Legislature for redress of grievances."

An examination of the opinion of the Supreme Court of California in the *McKay* case discloses that the opinion reaffirmed and rested upon the decision of the Supreme Court of California in *Parkinson Co. v. Building Trades Council* (decided in December, 1908), 154 Cal. 581 [98 P. 1027, 21 L.R.A. New Series 550, 16 Annotated Cases 1165], upholding a peaceful primary and secondary boycott.

The next year in the case of *Pierce v. Stablemen's Union* (decided July 6, 1909), reported at 156 Cal. 70 [103 P. 324], the Supreme Court of California again upheld the right of peaceful boycott, stating that the Court recognized no difference between the primary and the secondary boycott. (See pages 75 to 79, inclusive.) That decision handed down forty years ago referred to the rule adopted in many jurisdictions which disapproved of the right of peaceful boycott, but the Court frankly adopted what at that time was the minority rule and held that a peaceful boycott is lawful. The language that the Court referred to was as follows:

> "After striking, the employees may engage in a boycott, as that word is here employed. As here employed it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion, to induce others interested in or sympathetic with their cause, to withdraw their social inter-

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course and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the *moral* intimidation and coercion of threatening a like boycott against him if he refuse so to do. This last proposition necessarily involves the bringing into a labor dispute between A and B, C, who has no difference with either. It contemplates that C, upon the request of B, and under the moral intimidation lest B boycott him, may thus be constrained to withdraw his patronage from A, with whom he has no controversy. This is the 'secondary boycott', the legality of which is vigorously denied by the English courts, the federal courts, and by the courts of many of the states of this nation. Without presenting the authorities, which are multitudinous, suffice it to state the other view in language of the President of the United States but recently uttered: 'A body of workmen are dissatisfied with the terms of their employment. They seek to compel their employer to come to their terms by striking. They legally do so. The loss and inconvenience he suffers he cannot complain of. But when they seek to compel third persons, who have no quarrel with their employer, to withdraw from all association with him by threats that unless such third persons do so the workmen will inflict similar injury on such third persons, the combination is oppressive, involves duress, and if injury results, it is actionable.' (President Taft, *McClure's Magazine,* June, 1909, p. 204.) Notwithstanding the great dignity which attaches to an utterance such as this, which, as has been said, is but the expression of numerous courts upon the

subject-matter, this court, after great deliberation, took what it believed to be the truer and more advanced ground above indicated and fully set forth in *Parkinson v. Building Trades Council etc.*, 154 Cal. 581 [98 P. 1027]. In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withraw its patronage from its employer and to induce by fair means any and all other persons to do the same and in exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal."

This decision was followed the next year in the case of *Union Labor Hospital Assoc. v. Vance Redwood Lumber Company,* 158 Cal. 551, again upholding the right of peaceful boycott regardless of the damage which might accrue therefrom.

In January of 1935 the Supreme Court of California in *Lisse v. Local Union,* 2 Cal. (2d) 312 [41 P. (2d) 314], reaffirmed these former decisions and referred to peaceful picketing as being lawful in California, the only test as between lawfulness and unlawfulness being explained at page 321 as turning on the question of peaceful persuasion as against use of physical force. This line of decisions was affirmed in the *McKay* case, above cited, and the companion cases decided on the same day of *Shafer v. Registered Pharmacists,* 16 Cal.

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(2d) 379 [106 P. (2d) 403]; *Lund v. Auto. Mechanics,* 16 Cal. (2d) 374; *Smith Metropolitan Market v. Lyons,* 16 Cal. (2d) 389 [106 P. (2d) 414], and *Fortenbury v. Superior Court,* 16 Cal. (2d) 405 [106 P. (2d) 411].

The *McKay* and companion cases upholding the constitutional right of picketing and primary and secondary boycott have been upheld and reaffirmed in subsequent decisions of the California Supreme Court:

In re Bell, 19 Cal. (2d) 488, 497 [122 P. (2d) 22]

(where the Court took into consideration the fact that the picketing might cause some inconvenience and disturbance of traffic);

Steiner v. Long Beach Local, 19 Cal. (2d) 676, 681, 682

(where the right to picket was suspended during an era of extreme violence, but the constitutional right was upheld (p. 682));

Magill Bros. v. Bldg. Service Employees, 20 Cal. (2d) 506, 511 [127 P. (2d) 542]

(where, it appearing that unlawful statements had been made on the picket line, the making of such unlawful statements was prohibited without interfering with the right of picketing);

Emde v. San Joaquin County Labor Council, 23 Cal. (2d) 146, 154, 155

(where the boycott was expressed, in part, by publications in the official labor paper);

James v. Marinship, 25 Cal. (2d) 721, [155 P. (2d) 329, 160 A.L.R. 900]

(where the right was reaffirmed, but it was held not to authorize or support the right of the union to deprive qualified Negro craftsmen of their rights solely because of their race and color (pp. 728, 729));

Park & Tilford v. Teamsters, 27 Cal. (2d) 599 [165 P. (2d) 891, 162 A.L.R. 1426]

(where the California rule was upheld to the effect that even though a portion of the objective of the union might be unlawful, the right of picketing for the lawful portion of the objective could not be abridged (pp. 606, 607, 608));

In re Porterfield, 28 Cal. (2d) 91, 114 [168 P. (2d) 706, 167 A.L.R. 675]

(where these rights were upheld in connection with the right of organization and assemblage);

Northwestern Pacific v. Lumber and Sawmill Workers, 31 Cal. (2d) 44 [189 P. (2d) 277]

(where the right of picketing was denied because of violence and threats of violence, but where the California rule of the right to picket for a lawful and necessary objective was distinguished and upheld even though a portion of the objective might be unlawful (pp. 445-448)).

And, the latest and the most recent decision on this subject, handed down November 1, 1948, is

Hughes v. Superior Court, 32 A.C. 896, 901

(where the right of picketing was denied *in a non-labor union dispute* in support of what the Court conceived to be enforced discrimination in favor of persons of the Negro race against persons of the white race).

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Of course, included in the line of cases are the *Blaney* and *Lillefloren* decisions. The *Blaney* case involved facts similar to those in the *Lillefloren* case at bar, that is, picketing of the product or property of a struck employer at premises other than the plant or office of the employer. This operation is sometimes referred to as a "secondary boycott," although, strictly speaking, it is not such, since it does not involve action against *any person* other than the employer; it merely involves the picketing of the product or property of the alleged unfair employer—similar to the situation in *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, and *Bakery Wagon Drivers v. Wohl*, 315 U.S. 769; affirmed in *Carpenters and Joiners v. Ritter's Cafe*, 315 U.S. 722.

However, the Supreme Court of California, under this long established rule, uses the broad term "secondary boycott" to describe such activities as well as a personal boycott of an individual dealing with a struck employer under the definition of secondary boycott found in *Pierce v. Stablemen's Union, supra*, decided in 1909, 156 Cal. 70, 76, 77.

The Supreme Court of California has dealt in its own way and following its own precedents with the question of "conscripting neutrals". In a case which involved a situation completely analogous to the facts in the *Lillefloren* case, namely, the picketing of products or supplies of a struck or boycotted employer, the Supreme Court of California in the case of *In re Fortenbury*, 16 Cal. (2d) 405, has this to say (at page

407) with regard to a party dealing with such struck or boycotted employer:

> "Although the respondent argues that a person secondarily boycotted is an innocent third party caught between the upper and lower millstones of an industrial dispute in which he has no interest, this is clearly not correct. One who sells a product of a merchant or manufacturer engaged in a labor dispute with his employees, inescapably becomes an ally of the employer. He has a direct unity of interest with the one against whom labor's complaint is directed. By providing an outlet for that product, he enables the employer to maintain the working conditions against which labor is protesting. And unless the union is allowed to follow the product to the place where it is sold and to ask the public by peaceful representations to refrain from purchasing it, the workers have no opportunity to tell their story to those whose interest or lack of interest will, in large measure, determine the issues in dispute. (*Goldfinger v. Feintuch,* 276 N.Y. 281 [11 N.E. (2d) 910, 116 A.L.R. 477].)
>
> "Obviously, the establishment where a product is sold is the only effective point where the consumer may be told the facts concerning a labor controversy."

It will be noted that this language used by the Supreme Court in October 1940 fits in exactly with the ruling of that court in 1909 where, in the case of *Pierce v. Stablemen's Union,* 156 Cal. 70, 76, the Supreme Court used the language quoted previously.

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We thus have the rule, upheld by the Supreme Court of California for forty years without any deviation whatever (except possibly to make the rule stronger), first, that a primary boycott is lawful so long as it is peaceful, second, that a secondary boycott is lawful so long as it is peaceful, and third, that the secondary boycott does not involve interference with "neutrals" since those who deal with a struck employer are not, in fact, neutral in the labor dispute and that peaceful economic action against them to induce the temporary suspension of their business with the struck employer is not conscripting a neutral but is merely carrying on peaceful and legitimate activity within the real area of economic interdependence, that is to say, within the industry.

This rule, steadfastly upheld by the Supreme Court of California, is not in conflict with the rule of this Court. The decisions of the Supreme Court of California in the *McKay* and *Fortenbury* cases were handed down October 16, 1940. On March 30, 1942, this Court in *Carpenters and Joiners v. Ritter's Cafe,* 315 U.S. 722 [86 L. Ed. 1143], at pages 727-728, referred to the "restriction of picketing to the area of the industry within which a labor dispute arises" and states in effect that an extension of picketing beyond the area of the industry would be "to conscript neutrals having no relation to either a dispute or the industry in which it arose." This language has been frequently quoted in arguments opposing the right of secondary boycott, but it is clear that the language does not refer to such a situation as the one at bar.

In the case at bar the picketing which is objected to was the picketing of property, to wit, coffee, belonging to Farmer Bros., the employer in the dispute, which was ready for transportation to the Farmer Bros. main plant. The picketing was, therefore, clearly within the industry and within the area of the economic dispute. In the *Ritter's Cafe* case, the Court (at page 727 of the opinion) expressly reaffirmed the decision that was rendered in *Bakery and Pastry Drivers v. Wohl,* 315 U.S. 769, 62 S. Ct. 816 [86 L. Ed. 1178], which was the identical type of picketing involved in the case at bar, and, incidentally, the type of picketing referred to by the Supreme Court of California in the *Fortenbury* case, referred to above. It is clear, therefore, that this Court, in speaking of the conscription of neutrals in the *Ritter's Cafe* case, had in mind the facts in that case, namely, the picketing of a fully unionized cafe in connection with a dispute between a building contractor and building mechanics—carpenters and painters.

In a footnote to the *Ritter's Cafe* decision appears a reference to *Teller* on *Labor Disputes,* Vol. I, Section 123. With regard to this citation, we should remember, first, that Mr. Teller's book went to press in 1940 and was therefore written somewhat before that time. The first sentence of Section 123 is as follows:

> "The legality of the secondary picket has been denied wherever the question has arisen."

A glance at the authorities cited to support this statement (under Note 90) discloses a very interesting situation.

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Several California trial Court decisions handed down in 1938 and 1939 are cited against the right of secondary boycott. However, as pointed out above, the Supreme Court of California in October 1940 upheld the secondary picket line in the *Fortenbury* case, which is one of the companion cases in which the right of peaceful picketing was upheld as a constitutional right.

The Colorado decision of *Perry Truck Lines v. Brotherhood of Teamsters* (decided in 1939 and referred to also in Note 90) was reversed by the Supreme Court of Colorado (101 P. (2d) 436, 5 LRR Man. 930). The decision of the Supreme Court of Illinois in the *Meadowmoor Dairies* cases is also cited, but, as pointed out herein, that ruling was reversed by this Court in *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U.S. 287, 61 S. Ct. 552 [85 L. Ed. 836, 132 A.L.R. 1200], in which this Court held that picketing by striking dairy drivers of the customers of the dairies with whom they were in dispute, was proper and a constitutional right so long as the picketing was peaceful, and that the suspension of the right during a period of extreme violence (and while a renewal of the violence was imminent) was only temporary and that the restriction should be lifted the moment the imminence of the danger should cease.

Petitioner in this case argues that the Superior Court had a right to enjoin all picketing because of a previous unlawful demand. The Supreme Court of California in the *Lilleflorен* case pointed out (at 31 Cal. (2d) 440) that "the restraining order did not

forbid the making of such demand or engaging in the labor activity for such purpose," and went on to point out the rule in California that an injunction should be limited to the unlawful act—in that particular case, the unlawful demand, if such there were.

It is the well settled rule in California that all picketing may not be prohibited because a portion of the objective is unlawful. This rule is completely at variance with that prevailing in other jurisdictions. As an example, we may take the recent case of *Fred Wolferman v. Root,* decided by the Supreme Court of Missouri September 8, 1947, and reported in 204 S.W. (2d) 733, where the Court referred to the rule prevailing in that jurisdiction and in many others as follows (at page 736):

> "Both the answer and the evidence do disclose that one of the purposes for the picketing is for giving information to the public. While we assume that purpose is lawful still when it is coupled, as it is here, with unlawful purposes, the fact one of several purposes is lawful does not make the picketing lawful. Picketing for both lawful and unlawful purposes is unlawful. See *Restatement Torts,* Sec. 796. *Cf. Baush Machine Tool Co. v. Hill,* 231 Mass. 30, 120 N. E. 188; *Folsom Engraving Co. v. McNeil,* 235 Mass. 269, 126 N. E. 479."

The Supreme Court of California, on the other hand, has held in the *Lilleforen* case at the page just cited, in *Park & Tilford v. Teamsters, supra* (at page 607), in *N. W. Pac. R. R. Co. v. Lumber & S. W. Union,* 31 Cal. (2d) 441 that picketing for an objec-

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tive, or a portion of an objective which is lawful, may not be prohibited because picketing for another objective or portion of an objective involved might be unlawful.

In addition to the basic and fundamental rules of California law, above referred to, there is another well established principle which is vital to the present issue and in which the rule in California may be at variance from the rule in some other jurisdictions. The rule in question is that there is no obligation on any one to obey a void injunction (*Fortenbury v. Superior Court,* 16 Cal. (2d) 405).

To the same effect:

Kreling v. Superior Court, 18 Cal. (2d) 884.

VI.

THE RIGHT OF FREE SPEECH, SUBJECT ONLY TO THE CLEAR AND PRESENT DANGER RULE, HAS BEEN UPHELD BY THIS COURT FOR A QUARTER OF A CENTURY, AND THIS RIGHT HAS APPLIED TO PEACEFUL PICKETING FOR ALMOST A DECADE.

In April 1940, this Court for the first time considered elaborately the right of peaceful picketing under the guarantee of the First and Fourteenth Amendments. Previously this Court had upheld this constitutional right in cases where peaceful picketing was involved. In *Senn v. Tile Layers,* 301 U.S. 468, 57 S. Ct. 857 [81 L. Ed. 1229], this language is used at page 478:

> "Members of a union might, without special statutory authorization by a state, make known

the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

This language has been cited in subsequent decisions.

Also in the decision on the consolidated cases reported under the name *Schneider v. State,* 308 U.S. 147, 60 S. Ct. 146 [89 L. Ed. 430], it appeared that four ordinances passed by cities in four different states abridging the right to distribute handbills were all held to be unconstitutional as infringing the rights secured by the First Amendment, also by the Fourteenth Amendment. One of these cases, *Snyder v. City of Milwaukee,* involved distribution of handbills by a picket. This Court impliedly upheld the constitutional right of picketing by invalidating that particular ordinance along with the others.

In *Thornhill v. Alabama,* 300 U.S. 88, 60 S. Ct. 736 [87 L. Ed. 1290], *supra,* however, the Court went into detail in discussing and upholding the constitutional right of peaceful picketing, and the discussion is directly applicable to the case at bar. The so-called findings in the case at bar (R., p. 146), which apparently involved a hearing or other consideration of the guilt of the defendants (although there was no hearing or consideration other than ex parte on the issuance of the temporary restraining order), the basis of the contempt charge (R., p. 108) showed that petitioner and others were engaged in picketing a certain shipment of coffee belonging to the petitioner Farmer Bros. (R., p. 109.) The finding of contempt (R., p. 149) goes into lurid detail as to all the acts and conversation of the various parties. There is no

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pretense of violence or the threat of violence, although it is clear that the purpose of the picketing was to persuade, if possible, employees having charge of the shipments not to deliver them. In other words, it is clear from this finding of contempt that petitioner was engaged in a boycott of shipments belonging to Farmer Bros., the employer in a labor dispute.

Incidentally, this is in direct conflict with the allegation of the complaint, on which petitioners rely, which alleges positively not even on information and belief that there is no boycott (R., p. 13, para. XVIII):

> "That now, and at all times herein mentioned, there existed and exists no strike and no lockout, and *no boycott*, either individually or in groups." (Emphasis added.)

Now let us return to the decision of this Court in *Thornhill v. Alabama*. We find that the violation there was not of an injunction but of a statute of the State of Alabama whose purport is set out in 310 U.S. at pages 91 and 92. There the prohibition runs against "any person or persons * * * who go near to or loiter about the premises * * * for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another."

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In the case at bar, it is not a statute which is alleged to have been violated, but a restraining order. In the case at bar, the defendants, including *Lillefloren*, were prohibited from "* * * combining or agreeing to cease performing or to cause any employee of [various companies] to cease performing any services for said employers, or any of them, or causing or agreeing to cause any loss or injury to such employers, or any of them, for them, or causing or agreeing to cause any loss or injury to such employers, or any of them, for the purpose of inducing or compelling such employers, or any of them, to refrain from doing business with plaintiff * * *"

In the *Thornhill* case, the prohibition was against anybody influencing or inducing people not to do business with any particular concern. In the case at bar, the prohibition is against "ceasing to perform services or causing any employee to cease performing services, etc." In both the *Thornhill* case and the case at bar, the persuasion or influencing, in other words, the unlawful act in each case, consisted of picketing. In the *Thornhill* case this Court discussed the situation from a common sense, factual standpoint. At page 99, the Court said the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between employer and his employees, and therefore to induce such customers not to patronize such employer, and at page 100 of the decision the Court used this language, "An intention to hinder, delay or interfere with a lawful business * * * can be proved merely

by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute." And on page 104 this Court recognized that the picketing might have its anticipated result. The Court said:

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society."

In the *Thornhill* case, this Court held the statute to be unconstitutional, a violation of the rights secured by the First and Fourteenth Amendments. In the case at bar, the Supreme Court of California released *Lillefloren* and his companions from punishment for violation of a similar abridgment of their constitutional rights.

In the *Thornhill* case, this court said (at pages 105-6):

> "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

Now let us refer briefly to the development in the line of decisions of this Court of the right of free

speech subject only to the clear and present danger rule, referred to in the last citation.

Since the *Thornhill* case was the first case discussing elaborately this right of peaceful picketing there was no line of decisions on that subject which could be referred to as authority. However, at page 95 of the *Thornhill* opinion we have this line of cases referred to as authority:

Schneider v. State, 308 U.S. 147, 160, 60 S. Ct. 146, 150 [85 L. Ed. 430];

Lovell v. City of Griffin, 303 U.S. 444, 450, 58 S. Ct. 666, 668 [82 L. Ed. 949];

DeJonge v. State of Oregon, 299 U.S. 353, 57 S. Ct. 255 [81 L. Ed. 278]

(no specific page is mentioned, but page 264 might well have been mentioned);

Grosjean v. American Press Co., 297 U.S. 233, 244, 56 S. Ct. 444, 446 [80 L. Ed. 660];

Near v. Minnesota, 283 U.S. 697, 707, 51 S. Ct. 625, 627 [75 L. Ed. 1357];

Stromberg v. Carlson, 283 U.S. 359, 368, 51 S. Ct. 532, 535 [75 L. Ed. 1117, 73 A.L.R. 1484];

Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 629 [69 L. Ed. 1138]

(at pages 627, 673 of this case is found the dissenting opinion of Mr. Justice Holmes, which dissenting opinion with regard to the clear and present danger rule states the law as now accepted).

Now bearing in mind that the protection of the First Amendment—freedom of worship, freedom of

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speech, freedom of the press, freedom of assemblage and freedom of petition—the cases cited by this Court in the *Thornhill* decision cover several of those rights.

Schneider v. State, as stated above, referred to free speech as expressed by the distribution of handbills in connection with a picket line or other peaceful activity. *Lovell v. City of Griffin* covered the same subject matter—handbills. *DeJonge v. State of Oregon* involved the right of peaceful assemblage, and a Communist agitator was set free by this Court because he has not at the particular Communist Party meeting which he had attended done or said anything unlawful. *Grosjean v. American Press* was in protection of the right of freedom of the press.

Near v. Minnesota also secured freedom of the press even where the newspaper involved was a scurrilous, libelous sheet. *Stromberg v. Carlson* extended the right of free speech to include the display of a red flag. *Gitlow v. New York* was one of the sedition cases arising out of the First World War, and this is one of the earliest cases where this Court, in majority opinions and in dissenting opinions of Justices Holmes and Brandeis, began to emphasize more and more clearly the clear and present danger rule. From *Thornhill v. Alabama* down to the present this right of peaceful picketing in connection with a labor dispute has been upheld by this Court. Statements are found among these decisions as among the decisions of the Supreme Court of California and of other Courts to the effect that this right is subject to rea-

sonable regulation. Somewhere in the brief of petitioners it is stated that a pattern has been laid out which fixes the limitations on this right, and counsel is entirely correct as to that statement.

This Court has held that the right to picket does not include the right to picket with extreme violence (*Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552 [85 L. Ed. 836, 132 A.L.R. 1200]). But it was made clear in that case that the prohibition upheld by this Court had to do only with the violence and not with the picketing. But the Court in that case said (at page 297):

> "We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here."

And on page 298 the Court said:

> "The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation."

In *Carpenters v. Ritter's Cafe,* 315 U.S. 722 (at 727) the Court upheld the right of carpenters and painters to picket an unfair contractor, but upheld the

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state Courts of Texas in limiting the permissible picketing to the area or nexus of the dispute. However, the Court (at page 727) distinctly upheld the right of picketing under the circumstances present here, that is, in support of the secondary boycott, by affirming the *Wohl* case, that day decided. In *Bakery and Salesdrivers v. Wagshal,* 333 U.S. 437, the Court refused to allow picketing for the purpose of collecting a private debt, enforcing the same rule mentioned in the oft quoted rule in *Dorchy v. Kansas,* 272 U.S. 306, 47 S. Ct. 86, where the state law prohibiting a strike for the purpose of collecting a private debt was upheld.

Bearing in mind that the rights protected by the First Amendment are cognate, that they cannot be dealt with as if they were of different or diverse character, and that one cannot be destroyed or abridged without abridging all the others, it might be well to mention four or five other decisions of this Court which have upheld these fundamental rights. In *Hague v. Committee,* 307 U.S. 496, this Court upheld the right of peaceful assemblage. In *A. F. of L. v. Swing,* 312 U.S. 321 (decided at the same time as the *Meadowmoor* case, *supra*), the Court upheld the right of peaceful picketing in a dispute between an employer and a group of workers who were not his employees, thus recognizing that a union of workers is interested in labor conditions throughout the industry, as stated by Mr. Chief Justice Taft in the old *Tri-City* case (*American Steel Foundries,* 257 U.S. 184, 209) and a similar ruling in *Cafeteria Employees*

v. Angelos, 320 U.S. 293; also in *Bridges v. California,* 314, U.S. 252, where the clear and present danger rule was applied in a case where the particular statements made had been held to be in contempt of Court; and lastly, *Thomas v. Collins,* 323 U.S. 516, a most important case, where the rights of assemblage was held by this Court to be so important that a labor organizer could not be obliged or required to register with a state agency before proceeding with his organizing work.

A steady adherence of this Court to the right of the freedom of speech in its various manifestations, including the right of peaceful picketing in a labor dispute, answers every contention of the petitioners here, that this right of peaceful picketing pursuant to a peaceful boycott in a peacefully carried on labor dispute can be abridged by a trial Court anywhere in America.

VII.

THE SO-CALLED HOT CARGO ACT WAS UNCONSTITUTIONAL AND VOID UNDER ALL OF THE CONTROLLING AUTHORITIES.

One of the specifications of error urged by petitioners is that the Supreme Court of California erred in holding the Hot Cargo Act unconstitutional. If the Supreme Court of California was correct in its decision, whether under the state or the federal constitutional provisions, manifestly the Superior Court of Los Angeles had no jurisdiction to issue the injunction

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which it did issue, and this proceeding must be dismissed. The opinion of the Supreme Court of California gives the best answer to this contention. (30 Cal (2d), page 643.)

Now there has been entirely too much glittering generality in the arguments attempting to restrict the constitutional rights of labor unions in controversies like the one at bar. These generalities have consisted of sentences taken out of their context to the effect that peaceful picketing may be limited, that is, subject to regulation, etc. In order to get down to the issue actually before the Court let us look at the words actually used by the legislature of California in this Act.

The Act (California Lab. Code, sec. 1131ff) defines the two terms "hot cargo" and "secondary boycott" and declares each of the particular acts or processes to be unlawful. Hot cargo is defined in Section 1134(a) as "any combination or agreement *resulting in* a refusal by employees to perform services for their employer because of a dispute between some other employer and his employees and a labor union. The Supreme Court of California held that this language means what it says and makes unlawful any agreement which might result in a refusal by employees to render services. The Supreme Court points out that this could cover any agreement of any kind by any group, and it is clear that it would include a resolution by a ministerial association or by a board of trade or by a mothers club or by any group of people

whatsoever which might have as a result the refusal by some body to handle goods produced by some particular concern who might be engaged in a labor dispute. There could be no question here of severability unless, as the Supreme Court of California pointed out, the Court should be required to rewrite the legislation.

Section 1134(b) defines secondary boycott as "any combination or agreement" to cease performing or to refuse to perform or to persuade any one else to refuse to perform services or to cause any loss or injury to an employer to induce him to refrain from doing business with some other employer, or to refrain from handling the products of some other employer. This involves the right to refuse to work on certain goods, which has long been held to be an indefeasible right of workers. There is no limitation whatever upon the inhibition. None of the qualifications referred to in *Thornhill v. Alabama* (page 99) are found, namely, "the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute". This would cover the refusal to handle the goods of an employer for pure reasons of health because the proper sanitary regulations were not complied with (if such were the cause of the primary dispute) or for any other reason for which Americans have always had the right to refuse to buy goods from any body, just as they have the affirmative right to

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buy goods from any body if their choose. Persuasion may be used under the California rule so long as it is peaceful and honest, either to persuade people to buy goods (*McKay Jewelers v. Bowron* (1942), 19 Cal. (2d) 595, where the Supreme Court of California struck down an ordinance of the City of Los Angeles which would have abridged the right of a merchant to sell goods by public outcry from his own front door, and the decision was based partly upon the fact that a group of workers would have the right to assemble in front of the door and urge people not to buy), or to refuse to buy (*Pierce* case, supra, p. 76). This is the California rule which was upheld in the decision of the *Blaney* case. (30 Cal. (2d) 643.)

Counsel points out that the word "picketing" is not mentioned anywhere in the statute. Everybody knows, however, that picketing was one of the means of publicity or persuasion sought to be prohibited by the act. And it is highly significant that the only act of these defendants which is alleged to have been in contempt of Court was the act of picketing. In fact, for some reason counsel saw fit to annex as exhibits (at pages 40a and 40b of the Record herein) photographs of the picket line. The members of the Court are invited to glance at these two exhibits. Note the completely peaceful attitude of the men and their smiling countenances.

These photographs are presented by the petitioners here and presumably are meant to prove their case in some respect. They are the only photographs which present the picket line. It will be observed that there

are three pickets, which of course negatives the idea of mass picketing; the men are smiling, which shows that there were no threats or menace of any kind. In fact, when the case is tried before the trial Court, if it ever is, photographs such as these would be very convincing to the Court as to the manner of the picketing for which these men were ordered to jail.

The hot cargo statute fits precisely and exactly with the language of this Court in *Thornhill v. Alabama,* where the statute of the State of Alabama was condemned because it "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and persuasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." (Pages 97 and 98.) If the California legislature had desired to pass an act which would have prohibited forcible action in a labor dispute or untruthful statements, such as were respectively condemned by the Supreme Court of California in *Steiner v. Long Beach Local,* 19 Cal. (2d) 676, and *Magill Bros. v. Bldg. Service Etc. Union,* 200 Cal. (2d) 506, 511, the legislature could have passed such a statute, but since they dragged within the ambit of the statute acts otherwise deemed to be lawful, the statute must stand or fall on its face.

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A statute so broad as this one is certainly too general to advise a person as to whether he is violating it or not, as pointed out so clearly by the Supreme Court of California in the *Blaney* case, 30 Cal. (2d) 643, 654.

This *amicus curiae,* the California State Federation of Labor, carried the burden of the fight against the Hot Cargo Act from its first passage by the legislature to its final invalidation by the Supreme Court of California in the *Blaney* case. This *amicus curiae* has urged upon this Court in the foregoing brief:

(1) That the petitioners have no standing in Court due to their failure to present any constitutional issue to the California Supreme Court;

(2) That the case is moot due to the dismissal with prejudice by Farmer Bros. of their complaint;

(3) It was also urged that the case at bar was properly decided by the Supreme Court of California under the long and well settled rules of California law; and,

Finally, that the decision of the Supreme Court of California in the *Blaney* case, which is sought to be injected into this proceeding, was decided correctly under the California Constitution and that the California rules of law, as well as under the provisions of the First and Fourteenth Amendments to the Constitution of the United States and the long line of decisions of this Court upholding the same.

Amicus curiae, California State Federation of Labor, asks that this proceeding be dismissed.

Dated, San Francisco, California,
December 20, 1948.

JOHN C. STEVENSON,
MATHEW O. TOBRINER,
CLARENCE E. TODD,
Of Counsel.

Attorneys for Amicus Curiae,
California State Federation of Labor.

(Appendix Follows.)

Appendix

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 191

The Superior Court of the State of California in and for the County of Los Angeles and Farmer Bros. Co. (a corporation), the real party in interest,

Petitioners,

vs.

Gay Lillefloren, Russell Marks, L. L. Sylvane, Homer Ford and Irv Magisen,

Respondents.

CONSENT TO THE FILING OF AMICUS CURIAE BRIEF.

We, the undersigned, being respectively the attorneys for the petitioners and attorneys for respondents in the above-entitled matter, hereby consent to the

filing of a brief *amicus curiae* by Clarence E. Todd, John C. Stevenson, and Mathew O. Tobriner.

Dated this 29th day of November, 1948.

Russell E. Parsons,
Attorney for Petitioners.

V. P. Lucas,
Attorney for Respondents.

David Sokol,
Attorney for Respondents.

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